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ABSTRACT

Results are presented of an intensive search of U.S. newspapers and periodicals on the joint custody of children after divorce, where both parents have continued responsibility for parenting and where the children spend part of each week, month, or year with both of the parents. Areas of concern addressed by these materials include the following: (1) the discovery that numerous couples have independently practiced joint custody in the past 12 years: (2) advantages and disadvantages of joint custody: (3) experiences of parents; (4) merits of the research: (5) legal aspects of joint custody and its future practice: and (6) the minimal criteria for undertaking joint custody. A bibliography of nearly 150 items is included. (Author)

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JOINT CUSTODY AND COPARENTING

National Council on Family Relations

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The joint custody of children of divorced parents is an old idea that has received increased attention within the past five years. Since the early part of this century joint custody has been used on occasion, but it was generally frowned upon by both judges and lawyers. In the 1970s with increased emphasis on equalitarianism, the increased participation of fathers in childrearing, and the passage of no-fault divorce laws, a few couples began to experiment with joint custody as a viable option to the problem of continued parenting after divorce, with or without legal recognition.

There is no uniform terminology or agreement on the definition of joint custody at the present time. Roman and Haddad define joint custody as:

> that post-divorce custodial arrangement in which parents agree to equally share the authority for making all decisions that significantly affect the lives of their children. It is also that post-divorce arrangement in which the child care is split equally between the parents, or at the most discrepant, child care resolves itself into a two-to-one split.[1]

Miriam Galper, who prefers the term co-parenting, defines it as "the children spend approximately equal amounts of time with each parent; and major decisions are made jointly concerning the health and well-being of the children."[2] In both of these definitions joint decision-making and equal or near equal physical custody of the children are emphasized. In actual practice, however, legal custody and physical custody are independent of one another.

Much of the current writing on joint custody arrangements describes situations where the child or children continually shift residences on a three, four, seven or fourteen day schedule. In actual practice the children may shift on a wide variety of schedules, including the school year with one parent and vacations with the other parent. A few couples have allowed the children to remain in the home while the parents shift in and out on a regular schedule. The children who shift homes on a regular basis generally have both parents in the same general neighborhood, one case has been reported of an east coast-west coast joint custody and one case of an international joint custody with annual residence changes.

Split or divided custody generally means that some of the children reside with one parent on a permanent basis and the rest of the children reside with the other parent. In this arrangement each parent is responsible for the children under his or her care. The courts generally have been reluctant to order split custody. In Goode's 1955 study of divorce, only seven out of 425 families had split custody and just one family had joint custody.

Joint Custody in the Mass Media

Although joint custody did not attract the attention of the mass media until 1975, as more and more articles appeared, it became apparent that numerous couples were practicing joint custody in their own quiet way for many years. The media described the following families, and the dates when

their joint custody began: The Goldscheiders (1967)[3], the Schneiders[4] unsuccessfully in Los Angeles (1971), the Sheedys[5] in New York (1971), the Hollys[6] in New Haven (1972), the Baums[7] in New York (1971), the Joseys[8] in Atlanta (1973), the Galpers[9] in Philadelphia, and the Tiltons[10] in Buffalo (1974). Except for the Hollys, nearly all of these couples seemed to think that this arrangement was unique with them.

It is interesting to note how a concept is transmitted by the media. Although an article on joint custody by Goldscheider appeared in Parents' Magazine in 1974, the first national publicity concerning the joint custody arrangement of Daniel Molinoff, a Long Island attorney, appeared in the Christian Science Monitor in May 1975. In the fall of 1975 Molinoff wrote an article about his experiences with joint custody that appeared in the Los Angeles Times and two smaller newspapers. Charlotte Baum wrote about her five-year experience with the joint custody of her three children in the New York Times Magazine in October 1976. This article was subsequently reprinted in Cleveland, St. Louis, Philadelphia and Chiacgo newspapers. These five newspapers had a combined circulation of over four million copies. This was the first mass dissemination of the joint custody concept.

A search was made to determine how much publicity joint custody has received since 1970. Seventeen indexes of United States and Canadian newspapers, and NewsBank which selectively indexes over 200 U.S. newspapers were searched for joint custody articles. The number of articles that were found is as follows: 1975 - 4; 1976 - 9; 1977 - 14; 1978 - 20; 1979 (Jan. - June) - 8, for a total of fifty-five articles. While this is only a sample of the press, it is probably indicative of the increased publicity joint custody has received. The New York Times carried six articles, and the Christian Science Monitor had five. During this period New York State newspapers had ten articles, California papers had eight, Wisconsin seven, Oregon, Illinois, and Texas three each, Michigan and Minnesota two each, nine other states and the District of Columbia each had one article. Two articles were found in Canadian newspapers. The headlines of these articles seemed to be less skeptical of joint custody after 1977. Generally, the articles reported favorable experiences of joint custody and generally accepted the idea.

A search of five indexes of popular magazines revealed only a dozen articles published since 1974. They are as follows: 1974 - 1, 1975 - 1, 1976 - 4, 1977 - 2, 1978 - 2, 1979 (Jan. - June) - 4. None of the articles, except a recent one, ran for more than three pages and most were only one page in length. Again the treatment of joint custody was generally favorable. Dr. Constance Ahrons, in her joint custody research in San Diego, asked joint custody families how they heard about joint custody. The sources most often mentioned were attorneys, the media, and friends. As joint custody becomes more widely practiced there will probably be more articles which in turn will influence more people to try it.

The Pros and Cons of Joint Custody

Strong arguments have been advanced both for and against joint custody. The arguments in favor run as follows: (1) the parental relationship is

not terminated as a result of divorce, (2) there is a greater sense of security for children having the care of both parents, (3) divided loyalties are less of a problem in joint custody, (4) the quality of the time spent with each parent is improved, (5) parents are not winners or losers in the custody question, (6) there is more free time for each parent since the children are not under their direct care continually, (7) children can relate more freely to each parent without feeling guilty, (8) parents are no longer separated into the significant and insignificant parent, there are stronger bonds to each parent, (9) it gives men a new opportunity to parent, (10) it encourages cooperation between the ex-spouses, it fosters a process of resolving disputes without resorting to litigation or having to follow externally imposed decisions, (11) the couple recognizes mutual rights, (12) it is fairer when both parents are competent, (13) support and visitation become less of a problem, (14) both parents are involved in the daily routines of the children, (15) the children show greater independence, (16) one parent doesn't have to prove that the other parent is unfit. Many of these advantages could be tested by research on joint custody families.

The arguments against joint custody are: (1) it is stressful to young children who need a stable environment, (2) there may be a continuing power struggle between the spouses, (3) since joint custody requires that the ex-spouses be involved with each other, unresolved difficulties from the marriage may cause conflicts, (4) value conflicts over childrearing practices, (5) remarriage may complicate the joint custody arranagement, (6) geographical mobility is impossible because residence is restricted to a contiguous geographical area, (7) it is more expensive to maintain dual residences, clothes, toys, etc., (8) it is unconventional, opposition will be expressed by friends, neighbors, and teachers, (9) it disrupts the children's social lives, (10) women are more capable of childrearing than men, (11) often parents cannot set their anger toward each other aside long enough to focus on the best interests of their children, (12) it may require the parents to reorder their priorities e.g., career, promotions, remarriage, recreation in order to coparent, (13) it fosters continued dependence of the parents upon each other when they should be letting go of the relationship, (14) the children need one home and one primary parent. Again many of these propositions could be tested by empirical research.

Does joint custody really work? The overwhelming evidence at the present time seems to be in the affirmative. It may be that only the best-suited couples are willing to risk this mode of living. But the testimony of case workers, the media, research and the families themselves indicates that this is a viable option to our present sole custody arrangements for some couples. This does not mean that joint custody is problem-free, that counseling and/or mediation may not be necessary to make it work since norms have not been developed. Both Roman and Galper document the difficulties that often confront these parents:

> the child becomes ill when you have custody
> you have to go out of town when the child is at your house
> an essential piece of clothing or favorite toy is at the other house
> keeping track of joint expenses

the child's adjustment to the other parent after a change of residence
comments from other people who disapprove of joint custody
one of the parents wants to move
the child gets tired of changing homes
you remarry, and your new spouse wants to be an active parent
different values in childrearing
the child is unhappy in this arrangement

However, experience has indicated that in many of the families the following occur:

parents become closer to their children
the children don't feel like visitors, but actually live in both homes
fathers become more nurturing, and are happier
neither parent feels so much like a single parent
the children get more attention from parents than children in many intact families
the children are more independent

The Research on Joint Custody

The author has found seven research studies conducted on various aspects of joint custody in the past three years. The research was undertaken with small, non-random samples which impairs its generalizability. These studies focused on four to thirty families, for a total of seventy families. It is recognized that a phenomenon as new as joint custody makes rigorous research impossible or at least impractical until the practice becomes more widespread. Three of the studies focused on joint custody per se, two studies compared mother-, father-, and joint custody, and two focused on fathers who had custody, some of whom had joint custody. Most of the studies gathered the data by means of extensive interviews although two used mail-out questionnaires. In three of the projects both parents were interviewed, in two studies the children were also interviewed, and in one the children's teachers were interviewed as well. Three of the investigations were conducted in California and two in New York.

The most outstanding findings of these studies were: (a) the lack of dire consequences for the children as predicted by judges and some psychologists, (b) the greater satisfaction of both parents with the arrangement when compared with sole custody.

Shavin[11] studied seventeen joint custody families in the San Francisco Bay area who returned mail-out questionnaires in 1976. Seventy-nine per cent of the parents characterized their post-separation relationship as cooperative while twenty-one per cent said that it was hostile. The schedules for alternating physical custody varied from daily to yearly. The parents felt that their children were generally well adjusted (quoted in Abarbanel, p. 44-45).[12]

Abarbanel studied four joint custody families in depth from the San Francisco Bay area in 1976. Data were collected by means of five-hour interviews with each of the eight parents, plus questionnaire information. There

was participant observation of the parent-child interaction during a meal in each parent's home. The children and the children's teachers were also interviewed. Abarbanel's doctoral dissertation[12] gives a wealth of detail on these four families, with their divergent lifestyles and values, and an inside view of the functioning of joint custody families. Her main findings are summarized elsewhere. The schedules of these families varied, with two families alternating custody weekly, one family using a 4 day/3 day schedule and one family using a 9 day/5 day rotation. Generally the children were well adjusted, and the parents saw positive benefits in joint custody although it continued to be a demanding arrangement. As one parent said, "shared parenting is really a total lifestyle. It starts affecting all kinds of things - your geography, your economy, your psyche, your head, your affectionate close relationships, sexual relationship, all kinds of things."[13] All of the parents had some ambivalent feeling, and expressed some anxiety about the impact of the dual life and the effects of moving back and forth.[14] The situation of one parent gave a glimpse of the possible complications caused by a new adult relationship when at the end of the research Gloria had just moved in with Bob. He has joint custody of his five year old daughter two out of every four weeks. Gloria has her five year old daughter nine days out of every fourteen. They will have twenty-five days each month with one or two children, and five child-free days together each month.

Nehls[15] received questionnaires from a dozen joint custody parents in eight joint custody families in Madison, Wisconsin, at the end of 1978. A majority of the parents said that joint custody was their own idea but they sought additional information from a court counselor or a lawyer. In this study, the children spent equal amounts of time with both parents in three families, unequal amounts of time in three other families, and in two families the children were split between the mother and the father. The parents perceived that their children were satisfied with the arrangement in most cases and only one child in twelve in the study was having serious problems with joint custody. The majority of the parents maintained that the most important advantage of joint custody was that both parents had an active and/or meaningful role in the child's life. Eight of the twleve parents would choose joint custody if they had it to do over, while the other four were uncertain, although they were not wholly in favor of sole custody either.

Ahrons has begun an extensive, longitudinal study of joint custody and its relation to sole mother or father custody. She conducted two hour interviews with 41 parents in 30 families in the San Diego area in 1978, attempting to investigate the dimensions of the parenting relationship, the amount and context of relating of former spouses on non-childrearing issues, amount of anger, guilt, caring and attachment for the former spouse and individual psychiatric symptoms. In San Diego County physical custody is a separate determination within the joint custody decision. Eight parents had joint physical custody, 17 mothers and 14 fathers had physical custody separately, and two parents divided the physical custody of their children. The majority of the parents with joint custody (65%) saw their children once a week or more often. Where physical custody was not joint, some of the families resembled the traditional mother custody/father visitation arrangement. This makes the study difficult to interpret with the various types of physical custody within the joint custody arrangement. The most frequently shared dimensions of the parental relationship

were: making major decisions regarding the children's lives (64%), discussing school and/or medical problems (61%), planning birthdays and holidays (58.5%).[16] A large majority (84%) reported that they were satisfied with the joint custody arrangement, citing the advantage of the child's access to both parents and to more flexibility in child care. Nearly one half of the parents reported that they were now more actively involved in their children's lives than they were at the time of separation or during the marriage. This theme reoccurs in much of the research on joint custody. Most of the families (71%) spent some time together as a divorced family, usually on holidays or children's birthdays.[17] Parents were more likely to be involved with their children one year post divorce where the relationship with the former spouse was characterized by low overt conflict and moderate to high support.

Luepnitz is also in the process of comparing a non-clinical sample of families with joint and sole custody. In 1978-79 she studied eleven joint custody families in the Buffalo, New York, area. Physical custody alternated from daily to yearly. In eight of the families the joint arrangement was judged by the parents and the investigator to be working very well. In three of the families the arrangement was extremely unsatisfactory to at least one family member. In all three of these families, one parent had weekday custody and the other parent had the children for the weekends. In the sole custody families, over one half had returned to court at least once after the divorce concerning financial conflicts; none of the joint custody families returned to court even though they had serious financial disputes which they were able to settle out of court. One joint custody father said, "It is so much better to be 100% of a parent 50% of the time than 50% of a parent 100% of the time. Why didn't someone think of this sooner? You shouldn't have to get a divorce to do this!"[18]

Two studies looked at custody and fathers and incidentally at joint custody. Keshet and Rosenthal[19] did up to ten hours of interviewing with divorced fathers who had substantial responsibility for rearing their children. They describe the initial adjustments to single fatherhood, of accepting increased responsibility for the children, scheduling, and becoming attentive to the children's emotional needs.

Greif conducted two hour interviews with fathers who had a total of ten children in joint custody. Fathers with joint custody perceived a significantly smaller decrease in their parental influence post divorce with respect to their children's emotional development, moral development, teaching the child how to behave, and financial decision-making. The fathers with joint custody were more satisfied than fathers with less contact or no custodial rights. Fathers with joint custody did not feel shut out from their children's emotional lives as did those fathers without custody. The joint custody fathers did not feel that the arrangement posed a difficulty for their children's social lives.[20]

The Jewish Family and Children's Services of San Francisco is in the process of an extensive study on joint custody in cooperation with the California Women Lawyers. They are trying to pinpoint the factors which make for successful joint custody.[21]

In conclusion, the findings of these seven independent though unrepresentative studies seem to point in the same direction, that while joint custody is

complex, and sometimes difficult, it seems to be beneficial to most of the participants most of the time. It keeps children and parents interacting on a deeper level of caring, it gives the single parent time to be free of child care responsibilities, and it does not appear to be harmful to the children.

There are many questions still to be answered by further research. Since most of the studies focused on pre-teen children, how well do adolescents adapt to joint custody? How does joint custody work when one or both parents remarry or establish other intimate relationships? How does joint custody work over a decade or more? What are the long-term effects of joint custody on children? What are the prerequisites for successful joint custody? What are the conditions that would contraindicate joint custody? Should joint custody be assumed by the courts after a divorce occurs, unless there is evidence to the contrary? More study, preferably longitudinal ones, will be needed to answer these questions.

Legal Aspects of Joint Custody

"Alternating or divided custody has had a curious history in this country. The early cases in many jurisdictions reveal that custody was divided almost as a matter of course, where each parent wanted custody, and no one had the temerity to assert that this Solomonic practice was improper until comparatively recent times. In 1908 the Mississippi Supreme Court first questioned the practice, and the issue was raised in South Dakota in 1910, and Kentucky in 1917. By 1930 several appellate courts had condemned the practice. Nevertheless the trial courts, which were much closer to the program, continued to enter decrees for divided custody. In recent years most of the appellate courts have come to recognize that if divided custody is evil, it is in many ways a necessary evil, and in several states the courts hold that a reasonable division is beneficial to the child."[22] This summary written in 1963 briefly indicates the changing views on joint custody in legal circles.

Many writers maintain therefore that the courts have generally been opposed to joint custody. Foster and Freed examined the evidence and find that this is not the case, while two other law professors[23] come to much the opposite conclusion. At a meeting of the American Bar Association where the Molinoff's joint custody decision was discussed[24] in 1975, attorneys did not seem very receptive to the idea. Foster and Freed wrote in 1978, "this is not to say that joint custody will never work, but merely that the overwhelming odds are against it and that it should not be tried save under optimal conditions."[25] The following year, after reading the growing literature on joint custody, they concluded that joint custody is a viable alternative when the circumstances are such that it will probably work. This change in attitude on the part of these well-known family lawyers will probably influence many of their colleagues.

The Association of Family Conciliation Courts has undertaken a project to educate lawyers and judges on the social, psychological and legal aspects of joint custody. A handbook was published in May 1979 containing a very useful selection of readings and original articles. This project should be useful in interpreting joint custody to those who will read it.[26]

Judges have been reluctant to award joint custody in the absence of legal authority to do so. Only five states have statutes specifically allowing

joint custody. These states are North Carolina (1953), Oregon (1977), Iowa (1978), Wisconsin (1978) and Maine (1978) About a dozen states are considering joint custody statutes and we will probably see more legislation in this area in the near future. A recent California case challenged joint custody under the California statute which does not specifically authorize joint custody. The right of joint custody was upheld (Neal v. Neal).[27] Only the statute of Louisiana is opposed to joint custody. The case law precedents of Texas and Florida generally oppose joint custody.

A discussion of the case law would be too extensive in this paper. The best overview of joint custody case law to 1963 is found in the American Law Reports.[28] The Joint Custody Handbook[29] contains extensive brief annotations of joint custody cases by states. The article by Bratt includes some of the more recent cases.[30] The Family Law Reporter cites and describes relevant recent decisions on joint custody cases.

Bratt presents some forceful arguments that many of the current custody decisions are probably unconstitutional. The first amendment generally does not allow undue interference in the private lives of individuals and she believes that many custody decisions may be in this category.

Folberg and Graham[31] describe the minimal criteria for undertaking joint custody:

(1) when both parents are fit
(2) both parents wish to continue active involvement in raising children
(3) both parents are capable of making reasoned decisions together in the best interests of the child
(4) joint custody would disrupt the parent-child relationship less than other custody alternatives.

Sample forms for drawing up joint custody agreements have been developed by a number of authors such as Gaddis[32], Galper[33], Folberg[34], and Woolley[35]. These forms contain useful areas for discussion in joint custody planning.

The Future of Joint Custody

The future of joint custody appears to be bright. Susan Whicher, a Boulder, Colorado, attorney who is active in the A.B.A. committee on custody, believes that by the end of the 1980s joint custody will be the rule rather than the exception.[36] Mel Roman has stated that 50% of divorcing couples could carry out joint custody, and another 25% could do it with counseling.

Programs are already underway to assist parents in working out plans for joint custody. Areas that have conciliation courts are using this service. Ware[37] cites a number of programs in California. Isolina Ricci holds classes both for coparenting families and trains professionals to help others.[38] Two books on custody published in July 1979 attempt to help parents work out custody agreements including joint custody.[39] With increasing knowledge and education joint custody should be able to benefit more families in the future.

NOTES

[1]Roman and Haddad, The Disposable Parent, p. 20-21.

[2]Galper, Co-parenting, p. 16.

[3]Goldscheider, "Not only on Sunday," Parents' Magazine.

[4]Huerta, Los Angeles Times, 1979.

[5]"Joint Custody," Newsweek, 1977.

[6]Holly, "Joint Custody", MS, 1976.

[7]Baum, "The best of both parents," New York Times Magazine, 1976.

[8]Lanier, "Couple has joint custody of child," Atlanta Constitution, 1976.

[9]Galper, Co-parenting, p. 15.

[10]Snyder, "Joint custody can work," Buffalo Evening News, 1978.

[11]Shavin, "Joint parenting after divorce." Unpublished Masters thesis.

[12]Abarbanel, "Joint custody families." Unpublished Ph.D. dissertation.

[13]Abarbanel, "Shared parenting after separation and divorce." American Journal of Orthopsychiatry, 1979

[14]Abarbanel, "Joint custody families," p. 266.

[15]Nehls, "Joint custody of children," in Joint custody: a handbook for judges, lawyers and counselors, p. C 32-38.

[16]Ahrons, "Joint custody arrangements," Journal of Divorce, in press.

[17]Ahrons, "The binuclear family," Alternative Lifestyles, in press.

[18]Luepnitz, Deborah. Personal correspondence.

[19]Keshet and Rosenthal, "Fathering after marital separation," Social Work, 1978.

[20]Greif, "Fathers, children, and joint custody," American Journal of Orthopsychiatry, 1979.

[21]Ramey et al. "Joint custody," Golden State University Law Review, p. 573.

[22]Cross, American Law Reports, p. 697-698.

[23]Foster and Freed, "Life with father," Family Law Quarterly, p. 340. See also "Bratt, Joint custody," Kentucky Law Journal, note 60, and Ramey et al., joint custody," Golden State University Law Review, p. 561.

[24]Divisive issues at ABA meeting concerning kids' fate. Family Law Reporter, p. 2708.

[25]Foster and Freed, "Joint custody: a viable alternative," Trial, p. 31.

[26]Joint Custody: A Handbook for Judges, Lawyers and Counselors, 1979.

[27]Overlapping joint, sole custody awards in abuse of discretion," Family Law Reporter, p. 2565.

[28]Cross, American Law Reports, p. 695-745.

[29]see note 26.

[30]Bratt, see note 23.

[31]Folberg and Graham, "Joint custody: myth or realty," in Joint Custody: A Handbook for Judges, Lawyers and Counselors, p. B 64.

[32]In Joint Custody: A Handbook for Judges, Lawyers and Counselors, p. E 1-6.

[33]Galper, Co-parenting, p. 101-105.

[34]In Joint Custody: A Handbook for Judges, Lawyers and Counselors, p. # 7-10.

[35]Woolley, The Custody Handbook, p. 317-318.

[36]"One child, two homes," Time, p. 61.

[37]Ware, "Joint custody: one way to end the war," New West, p. 44.

[38]Ibid.

[39]Woolley, The Custody Handbook, 1979 and Ramos, The Complete Book of Child Custody, 1979.

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